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IN THE

Supreme Court of the United States

October Term, 1959.
No. 873

JAMES A. GAINEY and J. L. YOUNG, Individually and on Behalf of Others Similarly Affected,
Petitioners,

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
and
THE PENNSYLVANIA RAILROAD COMPANY.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Caption Omitted.)

OPINION AND ORDER SUR MOTIONS TO DISMISS.

LORD, J. August 31, 1959.

The two named plaintiffs are employees of the Pennsylvania Railroad who assert wage claims against the carrier, and claims for damages and refund of dues against the union. The named defendant union will hereafter be called *The Brotherhood;* the defendant carrier will be spoken of as *The Railroad;* and references to The Act will signify the Railway Labor Act, 45 U. S. C. A. Sec. 151 *et seq.*

Each defendant has moved to dismiss, raising a variety of defenses and objections to be discussed herein.

The complaint, consisting of 20 paragraphs, an exhibit, and an amendment, was filed by plaintiffs in the form of a class bill on behalf of themselves and other persons similarly situated to recover about $1,750,000 back wages from the Railroad, a like amount as penalty against the Brotherhood, and an indeterminate sum for refund of dues paid to the latter.

The bill alleges that the Brotherhood is the duly authorized bargaining agent of the clerical employees (including plaintiffs as "tallymen") of the Railroad, so certified under the Act. A bargaining agreement between the Brotherhood, representing the employees, and the Railroad was

executed in 1942, covering the entire Pennsylvania Railroad System.

Under the terms of this agreement, tallymen at freight stations in the Central Region of the Railroad were paid on a straight hourly basis, whereas tallymen in the Eastern Region were paid on a tonnage rate, depending on the amount of freight handled. As a result, the Eastern Region tallymen (plaintiffs) received less take home pay per month than the Central Region men.

In paragraphs I through VII, in which the foregoing facts appear, there are the following recitals, among others. The named plaintiffs are residents, respectively, of Camden, New Jersey, and Philadelphia, Pennsylvania. The Brotherhood does business in Pennsylvania, maintains an office in Philadelphia, and is there represented by an authorized agent.

In paragraph I this cause is said to be

> "a civil action arising under the Constitution and laws of the United States brought under the Railway Labor Act, 45 U. S. Code 151 et seq."

In paragraph V plaintiff says:

> "The jurisdiction and venue of this Court are established by precedents of the United States Supreme Court which hold that the (Federal) right not to be discriminated against is implied in the Railway Labor Act, 45 U. S. Code 152 et seq.)"

The alleged class on whose behalf the suit is brought are those who are or were since August 1, 1950, the employees classified as Group I workers, i.e. clerks—more specifically known as "tallymen" in the Eastern Region of the Pennsylvania Railroad system. In that area (Altoona east to New York, Philadelphia, and Washington, D. C.) the asserted monthly wage disadvantage by comparison to the Central Region employees, was approximately $25 per

month (and later, due to general wage increases, $30 per month). In addition, the Central employees received sick leave benefits not available to the Eastern group.

The crucial paragraph VIII reads:

> "This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S.V.W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. In substance the defendant railroad company agreed to pay 'tallymen' on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit 'A.'"

Recitals add that the Railroad later refused to effectuate the agreement, and that the Brotherhood failed to enforce it, or follow up the negotiations. An amendment states that the Railroad, moreover, in 1951 eliminated tonnage payments to the tallymen, in contravention of the Act as well as the 1942 collective bargaining agreement.

After reciting the enforcement machinery which was at the disposal of the Brotherhood under the Act, the fact that the Brotherhood at all times enjoyed the benefit of competent counsel is pointed out. The next allegation, XIII, must speak for itself:

"The only reason for failure of the Brotherhood to compel the Pennsylvania Railroad Company to abide by its agreement is that the Pennsylvania Railroad Company could control union officers at will. For all of the officers of the Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees were former officers of the Pennsylvania Railroad Company union which was disbanded by the carrier in 1937 when the Brotherhood obtained the collective bargaining rights for this craft on the Pennsylvania Railroad."

Paragraphs XIV and XV state that plaintiffs have no specific remedy under the Act, and

". . . no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Company has gone unheeded by all echelons of the Brotherhood since 1951."

After reciting the resultant economic hardship to plaintiffs, XVII says:

"Though the carrier has a constitutional right to discriminate against employees when it agrees to remove that discrimination as a part of a collective bargain it cannot then attempt to abrogate that agreement and renew the discrimination to the pecuniary detriment of employees."

Paragraph XVIII alleges the wrongful discrimination, asserts third party beneficiary rights of the plaintiffs in the alleged agreement; and claims the right of plaintiffs to enforce the agreement against the Railroad and "to sue the Brotherhood for breach of trust." Paragraph XIX specifies actions which the Brotherhood might have taken by way of enforcement of the alleged agreement and concludes with

the recital that the Brotherhood continues to ignore its duty.

Damages are asserted, as result of defendants' wrongful acts, on behalf of "a minimum of 600 persons on the Eastern Region" comprising the class, at $30 per month since 1950 —amounting to $1,734,000 exclusive of interest. In addition to general equitable relief, they demand:

> "1. Mandatory injunction compelling defendant Pennsylvania Railroad Company to equalize the pay scale [as described];
>
> "2. Damages against the Pennsylvania Railroad for losses in earnings for a minimum of $1,734,000.
>
> "3. Interest against the Pennsylvania Railroad Company at 6 per cent from August 1, 1951 to the date of judgment.
>
> "4. Punitive damages on item (2) supra against the defendant Brotherhood equal to the judgment assessed against the Pennsylvania Railroad Company for wanton breach of trust and violation of the duty owed to the plaintiffs as agents, and for violating their statutory duty.
>
> "5. An order compelling the defendant Brotherhood to return dues collected from plaintiffs for the period in question since defendant gave plaintiffs no quid pro quo for these union dues."

1. *Jurisdiction over the Person; Insufficiency of Service of Process.*

The Brotherhood protests that it is not doing business within the District of the United States District Court for the Eastern District of Pennsylvania, and is therefore not subject to the jurisdiction of the court.

It also asserts insufficiency of service of process for the

reason that service (at the Board of Adjustment office at 15th and Locust Streets in Philadelphia) was not made at an office at which the Brotherhood regularly conducts business or upon a representative authorized by the Brotherhood to accept service on its behalf. Defendant insists that the Brotherhood conducts no regular business from the office mentioned, that the Pennsylvania Railroad System Board of Adjustment, of which J. C. McGuigan is an officer, is autonomous and independent of the Brotherhood, and that the Brotherhood has therefore not been served. *Farnsworth & Chambers Co., Inc. v. Sheetmetal Workers*, 125 F. Supp. 830 (D. N. Mex. 1954); *Isbrandtsen Co., Inc. v. National Marine Engineers;* 9 F. R. D. 541 (S. D. N. Y. 1949).

The affidavits in the present motion present virtually the same facts that were before Judge Sporkin in 1957. *McGovern, et al. v. Brotherhood of Railway Clerks*, Court of Common Pleas No. 2, Philadelphia County, September Term 1956, No. 3908 in Equity. After full consideration it was held that

> "... Service upon the local lodge was sufficient service upon the Brotherhood, Spica v. I.L.G.W.U., 388 Pa. 382 (1957), 130 A. (2d) 468 (1957); Tunstall v. Brotherhood of Locomotive F. & E., 148 F. 2d 403 (4th Cir. 1956); Operative Plasterers' and Cement Finishers' Association v. Case, 93 F. 2d 56 (D. C. Cir 1937), as was service upon McGuigan, who, as Assistant vice-General Chairman of the System Board constituted such an official for service of process as was contemplated by Pa. R.C.P. 2157. See Spica v. I.L.G.W.U., *supra;* Quinn v. Pershing, 367 Pa. 426 (1951); Underwood v. Maloney, 14 F. R. D. 222 (E. D. Pa. 1953); Claycroft v. United Mine Workers of America, 204 F. 2d 600 (6th Cir. 1953)."

This Court takes the same view of the service of process, and the interrelation of the System Board and the Brotherhood, and rules that jurisdiction of the person of the defendant Brotherhood was properly obtained.

2. *Is the Matter Res Adjudicata as to the Brotherhood?*

The Brotherhood claims that the matter presented by the Complaint is

> "res adjudicata, as to the Defendant Brotherhood, the matter having been fully litigated by the Court of Common Pleas No. 1 of Philadelphia County, December Term, 1953, No. 6298, affirmed on appeal by the Supreme Court of Pennsylvania at 348 Pa. 242 (1956) and certiorari denied by the Supreme Court of the United States wherein the claims respecting the questions raised in this case were dismissed."

That controversy began when a new Philadelphia freight station, known as the Butler Street Station, was opened in 1953. *Grand Lodge, B. of R. & SS C. v. Girard L.*, 384 Pa. 284 (1956). Freight business theretofore handled at several stations of the Pennsylvania and other lines was diverted to Butler, with a resultant reduction of the number of available jobs.

Dissatisfaction as to the reallocation of work caused certain lodges of the Brotherhood to refuse to pay their per capita taxes to the Grand Lodge within the time prescribed by the latter's constitution and by laws. The Grand Lodge brought suit for forfeiture of the charters of those locals. The Supreme Court held that the lower court had erred in refusing to enforce the forfeiture, since it was expressly provided for by the contractual undertaking of the parties. *id.* 384 Pa. 248, 268.

The opinion and record in that cause enable one to appreciate the undercurrents present in the instant acrimonious dispute. The questions there involved differ from those at hand, however, and the decision is deemed not res adjudicata for present purposes.

3. *Laches and Statutes of Limitations.*

Both defendants point out that the plaintiffs allege that an agreement was reached in 1950 but did not file their complaint until 1959. They cite the Pennsylvania 6 year statute of limitations (Act of March 27, 1713, 1 Sm. L. 76, 12 P. S. 31) as applicable at least by analogy, and Pennsylvania decisions. *e.g. Madera v. Monongahela Railway Co.*, 356 Pa. 460 (1947).

The collective bargaining agreement, furthermore, provides limits of from 60 to 90 days on the submissions of claims. Railroad's Exhibit 1, Rule 7-B-1. They collect cases to the effect that time limits in contracts, including collective bargaining agreements, have frequently been enforced as reductions of the statutory period for bringing contract actions. *Povey v. The Midvale Company*, 175 Pa. Superior Ct. 395 (1954), *cert. den.* 348 U. S. 875 (1954).

It is recognized that these defenses would prove formidable were the complaint otherwise supportable. In view of the allegations of discrimination and fraud, however, and assertions of the right to injunctive relief against continuing breaches of contract and of trust, this Court is not inclined to make summary disposition of the complaint on that short ground.

4. *Jurisdictional Amount Involved; Lack of Diversity of Citizenship; Not a Proper Class Action.*

These several jurisdictional objections, presented by defendants in different aspects, are based on the proposition that plaintiffs have failed to establish federal-question jurisdiction. Lacking such basis, there is not the diversity of citizenship required under 28 U. S. C. A. Section 1332, since the complaint recites that one plaintiff resides in Pennsylvania, as does the defendant Railroad. This Court

agrees that a federal question would be required in order to confer jurisdiction.

So far as it goes, the next proposition is doubtless correct. Defendants say that the fact that plaintiffs purport to bring a class action for a total of close to two million dollars is immaterial because separate and distinct demands cannot be aggregated to make up the jurisdictional amount. *Hughes v. Encyclopedia Brittanica*, 199 F. 2d 295 (7th Cir. 1952). The argument, however, goes only to the monetary claims, and disregards the claims for injunctive relief. Dismissal, therefore, cannot be granted on that score

The third point is that this is not a proper class action. In the absence of a federal question, it is said to be a contract action, of the type known as the spurious class action. In such, plaintiffs represent only themselves and others who actually intervene. *Knudsen v. Chicago and Northwestern Railway Co.*, 106 F. Supp. 48 (N. D. Ill. 1952); 3 Moore's Federal Practice, Par. 23.10 (2d ed., 1948).

Were the complaint otherwise good, this point would deserve serious consideration. As will be seen, the regulations of the Brotherhood are properly before the Court on these motions. The Constitution and the Obligation of this union prohibit any resort to judicial proceeding until after exhaustion of internal remedies. Sec. 2(b), Article 5, Const. The Obligation, appearing at page 13 of the Ritual, provides (at pages 14-15)

> "I further promise and declare that I will not under any circumstances resort to or bring suit in any court or courts either Federal, State or Provincial until after I have exhausted all my rights and used all means at my command within and under the laws of the Brotherhood.
>
> "I further declare that should I from any cause leave this Order my obligation shall remain binding and in full force."

It would be speculative, indeed, to resolve these motions on the assumptions which would be necessary in order to

make decisive the objections here discussed. On the other hand, it seems a strong assumption for any court to conclude that the present action automatically joins the 600 members, more or less, of the alleged class in seeming disregard of the undertakings of membership.

To reach the heart of the present matter, however, it seems necessary to determine whether or not this complaint shows that an agreement was ever made.

5. *Was the Alleged Agreement Ever Reached?*

The complaint alleges that an agreement was reached on August 1, 1951. Elsewhere, however, it seems to say that the Brotherhood should have entered into an agreement, and breached its duty in that respect. (Complaint, Par. VIII and cf. XVIII and XIX). Paragraph VIII speaks of an agreement as "consummated" on August 1, 1951, and confirmed by letter which was attached as Exhibit "A."

That Exhibit, reproduced verbatim, reads as follows:

Plaintiff's EXHIBIT "A"

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary Treasurer

G. R. Kershaw
Senior Vice General Chairman
G. M. Hill
Vice General Chairman
M. C. Renkenberger
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD
OF ADJUSTMENT
1214-16 Clark Bldg., 717 Libert Ave.,
Pittsburgh 22, Pa.
File 4.114 Eastern Region
Subject: Piecework on Tonnage
Rates of Pay —
Philadelphia Transfer

April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Division
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

"We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location.

"In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are

agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

"Will you please advise if you concur.

Yours truly,

/s/ S. V. W. Loehr
General Chairman

"Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S.V.W.L.

"Above letter found at X 162-163 of original-record C. P. #1, Dec. Term 1953, No. 6298."

One recalls that the Complaint (Par. VIII) recites that

". . . on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations and Transfer on behalf of the Pennsylvania Railroad . . . ."

whereby Eastern Division tallymen were to get pay and fringe benefits equalling those prevailing on the Central Region.

". . . The understanding between the Brotherhood and the carrier was reduced to writing as was the cus-

tom in like matters by a letter . . . confirming . . . attached hereto and marked Exhibit 'A.'"

The "confirming" letter clearly shows a date of April 21, 1950. How a letter of that date could confirm an agreement of August 1, 1951 is not explained. To the contrary, plaintiffs' brief in reply to the Railroad's Motion seems to concede that there was no agreement.

Plaintiffs therein quote at length from a case cited by the Railroad, *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950) at pages 242-243. They then say:

> "Thus, we can see that under this decision the Adjustment Board has jurisdiction to settle a dispute which involves the interpretation or application of an *existing agreement*, or disputes involving *the making* of collective agreements.
>
> "Do we have an *existing* agreement within the meaning of the *Slocum Case*, supra? Obviously not. The carrier and the Brotherhood are still operating under the old agreement, the terms of which were illegally changed. The terms of the new agreement are only partially in force. We are between two agreements!"

No unfairness to plaintiffs is intended by excerpting from context the statement that "we are between two agreements." It does seem reasonable to conclude, however, that if the complaint discloses a "new" agreement, it is simply an amendment of the old one.

However that may be, the complaint must govern here, and the exhibit pleaded as stating the agreement must control. And that letter, Exhibit "A", inescapably reveals itself as a mere offer or, possibly, a counter offer.

Insofar as the exhibited letter purports to quote in turn from a letter written by the Railroad on April 7, 1950, no support for the agreement theory appears. In the first place, the quotation does not bind the Railroad, even if one assume from the pleadings that there was no disclaimer by

the addressee. *A. B. Leach & Co. v. Peirson*, 275 U. S. 120, 48 S. Ct. 57 (1927). Furthermore, it simply expresses favor toward elimination of tonnage rates.

The letter itself, which is designated as a "confirmation," connotes an offer or counteroffer in its next to last paragraph by the passage commencing "This is based on our understanding . . ." At least, lack of prior oral agreement as to terms is implicit in the sentence "We suggest that this entire arrangement be made effective as of May 1, 1950."

The final sentence, which clearly asks whether the offer is acceptable, is deemed controlling as to the absence of prior agreement, *i.e.* "Will you please advise if you concur."

It seems patent that the requirements for the formation of an informal, bilateral contract were not met by the showing made on the complaint and exhibit, and it is so ruled. *Restatement of Contracts*, Secs. 19 and 22. The letter is found to fit the definition of an offer—a manifestation of intent. *Restatement of Contracts*, Sec. 24; cf. *Cohen v. Johnson*, 91 F. Supp. 231 (M. D. Pa. 1950).

6. *Jurisdiction over the Subject Matter; Failure to State a Claim for which Relief Can be Granted.*

In the light of the foregoing ruling, it seems appropriate to discuss these major objections simultaneously.

A. *Remedies under the Railway Labor Act Are Exclusive.*

Plaintiffs claimed jurisdiction here under the Act (45 U. S. C. A. 151 *et seq.*). Agreement or no, however, the United States Supreme Court in recent decisions has gone to some pains to make clear that the remedies under the Act are exclusive. *Pennsylvania R. Co. v. Day*, 360 U. S. 548 (1959); *Union Pacific R. Co. v. Price*, 360 U. S. 601 (1959).

It seems entirely clear in the cases that the Act itself is designed to settle disputes or grievances arising "out of the interpretation or application of agreements concerning rates of pay." 45 U. S. Code Sec. 153(i). Cases to the effect that "the jurisdiction of the Board to adjust grievances and disputes of the type covered by the Act is exclusive" are collected in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 161 F. Supp. 295, 297 (S. D. Calif. 1958). Thus, even had there been an agreement as to pay equalization, it does not follow that this court would have had jurisdiction.

Lurking in plaintiffs' complaint is an alternate suggestion that the Brotherhood should have entered into an agreement, and breached its duty in that respect. (Cf. Complaint, paragraphs XVIII and XIX). The procedures suggested by paragraph XI—whether to enforce or to negotiate an agreement—are not matters to be policed by a federal Court. That is, it is not for this Court to compel mediations under Sec. 5(first)(a)(b) of the Act (45 U. S. C. A. §155); to instigate recourse to a presidential fact-finding board; and much less to find fault with the Brotherhood for failing to seek a strike ballot (Cf. par. XI).

To the extent that collusion between the Brotherhood and Railroad is suggested (e.g. par. XIII), the result is the same. Plaintiffs bottom their cause on the existence of the collective bargaining agreement of May 1, 1942 (Par. VI), and seem to be in the position of the plaintiffs in *Bennett, et al. v. Progress Lodge 992, Brotherhood of Railway and Steamship Clerks, Etc. and The B. and M. Railroad*, 159 F. Supp. 93 (D. Mass. 1958).

In that case the complaint based jurisdiction on the Act (*inter alia*) and alleged that the plaintiffs were wrongfully discharged or denied employment and, as a result of collusion between the Brotherhood and Railroad, were denied a hearing before either. A motion to dismiss for lack of jurisdiction over the subject matter was granted for the reason that:

"All the claims advanced by these plaintiffs . . . involve a reading of the collective bargaining agreement and consequently are within the sole jurisdiction of the Railroad Adjustment Board."

B. *Allegations of Fraud and Collusion.*

Since the case last mentioned raised that very issue, it is appropriate here to mention that in addition to the averments of the complaint, the plaintiffs' briefs are replete with charges that go far out beyond those found in the complaint. On these motions, however, all that may be considered are the complaint, exhibit, and amendment, plus affidavits and exhibits as to matters inherent in the averments properly stated in the complaint. *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465, 469 (M. D. Pa. 1959).

Facts well pleaded in the complaint are assumed to be true. *Creswell-Keith, Inc. v. Willingham*, 264 F. 2d 76 (8th Cir. 1959). It is fully recognized that dismissals without a hearing on the merits are not favored. *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.*, 61 F. Supp. 62 (N. D. Calif. 1945). Acts of fraud not particularized in the complaint, however, cannot be considered. *Carrigan v. California State Legislature*, 263 F. 2d 560 (9th Cir. 1959), *cert. den.* 359 U. S. 980, 79 S. Ct. 961.

C. *Discrimination as Basis of Federal Jurisdiction.*

It is plaintiffs' position that the alleged discrimination gives a basis for direct recourse to the federal court. In that connection, it is necessary to examine some of the so-called *discrimination cases*. A leading case, which reviews the authorities, is *Conley v. Gibson*, 355 U. S. 41 (1957). Plaintiffs there had alleged that the railroad had purported

to abolish 45 jobs held by the petitioners and other negroes and fill the jobs with whites. They alleged the failure of their union, the designated bargaining agent, to represent them without discrimination in protection of their employment and seniority rights under the contract between the union and the railroad. Holding that it was error for the court below to dismiss for want of jurisdiction, the Supreme Court said at the outset (page 42):

> "Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with Steele v. Louisville & Nashville R. Co., 323 U. S. 192, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination [collecting cases]."

Those discrimination cases invariably involve racial discrimination, and are deemed not in point in the instant case. An exception, not heretofore cited, is *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955). There the plaintiffs were held entitled to a hearing on the merits upon their showing that the labor union had given notice that it was on the point of negotiating with the railroad an amedment to the collective agreement in direct defiance of the repeated adjudications of union tribunals at various appellate levels.

The discrimination cases seem to be of two classes: a larger group which concerns racial discrimination—then a much smaller category comprising instances of arbitrary and capricious action within a union, in defiance of that union's own internal procedures. An overt, hostile and invidious discrimination must be demonstrated in order to raise such ground. None of those cases gives color to the

assertion that there is a federal question presented by the instant complaint. For that matter, paragraph XVII of the complaint itself concedes that in the absence of the purported agreement of 1951 the Railroad is legally entitled to maintain a differing wage rate for tallymen in different geographic locations.

D. *Allegations of Facts Themselves Inconsistent with Facts Essential to Recovery.*

Before consideration of other grounds of objection, the hornbook rule is recognized that a complaint must be dismissed where it contains admissions or allegations which themselves are inconsistent with facts essential to recovery. This salutary rule is designed to prevent the courts and litigants from being subjected to the inconvenience and expense of patently defective actions. It may well be applied to the present complaint in a number of instances.

As an example, one sees that the complaint states an agreement, and yet the supporting exhibit shows itself, by its date as well as its own language, to be an offer or attempt at negotiation.

The complaint bases jurisdiction in this court on the Act, yet tacitly confesses that it seeks to avoid or bypass that Act by allegations of discrimination.

Further inconsistencies have been seen and will appear. Suffice it to say that the objections of defendants on this score are upheld.

E. *Failure to Show Exhaustion of Administrative or Contractual Remedies.*

It has been ruled above that the remedies under the Act are exclusive, and that plaintiffs clearly have not followed them, and that compliance with such procedures are prerequisite. 45 U. S. C. A. Sec. 153, First(i); *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950).

Apart from the Act, however, there is the procedure of the collective bargaining agreement and the internal procedure of the Brotherhood. That agreement and those regulations are before this court. The complaint has stated the existence of the collective bargaining agreement, and named the Brotherhood as the duly authorized bargaining agent for these plaintiffs. The defendant Brotherhood therefore quite properly incorporated in its motion the Constitution of the Grand Lodge and the By-Laws of the Pennsylvania Railroad System Board of Adjustment of the Brotherhood. *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465 (M. D. Pa. 1959). Those exhibits disclose a system of remedies for redressing any wrong which a member may suffer.

The rights and duties of that constitution and by-laws have been held to be fair and in compliance with fundamental justice and due process in three recent cases decided in Pennsylvania. *Grand Lodge of the Brotherhood v. Girard Lodge*, 384 Pa. 248 (1956); *McGovern v. Brotherhood of Railway Clerks*, Court of Common Pleas No. 2, Philadelphia County, September Term, 1956, No. 3908; *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465, 469 (M. D. Pa. 1959).

It is true that plaintiffs allege that they

> "... have no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Company has gone unheeded by all echelons of the Brotherhood since 1951."

That statement (Par. XV), otherwise unsupported, gives no indication that the internal procedure has been followed. Since that procedure has recently been analyzed in the opinion of Judge Follmer in the *Fagan* case, heretofore cited, to go over the entire ground seems unnecessary. See *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465 (M. D. Pa. 1959). It is patent that plaintiffs have failed to exhaust their administrative remedies within the Broth-

erhood and under their collective bargaining agreement, which is prerequisite to judicial relief. *Trainer v. International Alliance of T.S.E.*, 353 Pa. 487, 46 A. 2d 463 (1946); *cf. Underwood v. Maloney*, 152 F. Supp. 648, 658 (E. D. Pa. 1957). Thus, quite apart from jurisdiction under the Act, the plaintiffs have failed to make a proper showing to entitle them to relief.

For the foregoing reasons the motions to dismiss made by the defendant Brotherhood and the defendant Railroad are in each case granted and it is accordingly ORDERED that the complaint in this cause filed by JAMES A. GAINEY and J. L. YOUNG, et al. be and the same is hereby DISMISSED.

s/ JOHN W. LORD, JR.,
J.

B.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

(Caption Omitted.)

OPINION OF THE COURT.

(Filed February 24, 1960.)

By GOODRICH, *Circuit Judge*.

This is an appeal from the granting of motions to dismiss the complaint, 177 F. Supp. 421 (E. D. Pa. 1959). The plaintiffs, purporting to represent themselves and a mini-

mum of six hundred other employees similarly situated, sued Pennsylvania Railroad Company (Railroad) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Brotherhood) declaring that the action was brought under the Railway Labor Act, 45 U. S. C. A. §151 and following. The plaintiffs seek a mandatory injunction to compel the Railroad to equalize wages paid to "tallymen" in its eastern and central regions, damages for loss of earnings, punitive damages against the Brotherhood and a return of dues collected by the Brotherhood from the plaintiffs during the period in question.

The material allegations of the complaint may be summarized as follows: Plaintiffs are "tallymen" employed by the Railroad in its eastern region and are members of the Brotherhood; as such, they are covered by a collective bargaining agreement entered into between the Railroad and the Brotherhood on May 1, 1942. At all relevant times, they say, eastern region "tallymen" were paid approximately $25 per month less than their central region counterparts. This geographic differential in pay was the subject of a dispute. It is claimed that an "agreement" (reduced to writing in a letter attached to the complaint) was entered into in 1950 removing the differential. The letter also provided for the elimination of certain tonnage rates (the exact nature of which is not made clear by the complaint) in the eastern region. Despite this "agreement," it is alleged, the pay rates were never equalized, although tonnage payments to the eastern region "tallymen" were eliminated. The Brotherhood, it is charged, has never taken any steps to compel the Railroad to abide by its new "agreement" because "the Pennsylvania Railroad Company could control union officers at will." Accordingly, plaintiffs bring this action.

A seemingly insurmountable defense of the Railroad to this suit is Section 3, First (i) of the Railway Labor Act, 45 U. S. C. A. §153, First (i). This section provides for the referring of unresolved disputes "between an employee or

group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," to the appropriate division of the National Railroad Adjustment Board. Beginning with *Slocum v. Delaware L. & W. R. R.*, 339 U. S. 239, 244 (1950) and *Order of Ry. Conductors v. Southern Ry.*, 339 U. S. 255 (1950), the Supreme Court has held that primary jurisdiction in such cases as these lies in the Board and not in the courts, state or federal. See *Pennsylvania R. R. v. Day*, 360 U. S. 548 (1959), and *Union Pac. R. R. v. Price*, 360 U. S. 601 (1959), for the most recent reiterations and applications of this rule. The plaintiffs, themselves, acknowledge that "disputes between carriers and their employees as to interpretation of existing agreements must be referred to the National Railroad Adjustment Board." Plaintiffs argue that this litigation does not involve an interpretation of an existing agreement. In spite of the many words used in arguing this point, we think it has no merit. If plaintiffs have any claim at all against the Railroad it must be because of existing "agreements" between the Brotherhood and the Railroad; the allegation that the Brotherhood has permitted the Railroad to ignore the "agreements" does not remove this case from the Board's jurisdiction. This point alone would be sufficient to require dismissal of the complaint against the Railroad.

There is an additional reason why plaintiffs' basic claim against the Railroad must fall. That cause of action is based solely on a contract. According to the complaint,[1] that contract is embodied in a letter written by the General

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[1] Paragraph VIII of the complaint reads as follows:

"This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S. V. W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on Au

Chairman of the Brotherhood's Pennsylvania Railroad System Board of Adjustments to W. L. Nancarrow, General Manager of the Railroad's eastern region, under date of April 21, 1950. This letter is attached to the complaint and its authenticity is not denied by the defendants. The letter must be quoted in full because this is the peg upon which the plaintiffs hang their case. It says:

"Dear Sir:

"This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

"We quote from your letter:

"'We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location.'

"In accordance with our discussion at our meeting

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gust 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. 'In substance the defendant railroad company agreed to pay 'tallymen' on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit 'A'."

in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate fo pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

"Will you please advise if you concur.

"Yours truly,

"s/ S. V. W. Loehr

"General Chairman

We think no amount of discovery, deposition or other procedural device can make this letter into a contract. The district judge described it as "a mere offer or, possibly, a counter offer," 177 F. Supp. at 428. We are sure it is no more than that and would be inclined to say it is simply an invitation for further comment from the Railroad official to whom it is addressed. It is perfectly clear that an interpretation of a writing is for the court. An examination of this writing reveals plainly that it is not an acceptance under general principles of contract law or under the decisions of Pennsylvania courts[3] in which state this letter was composed, mailed and received. We reiterate that no amount of discovery can turn a letter which on its face is not a contract into one.

If the plaintiffs claim that the provisions of the earlier agreement have not been lived up to, they may make their

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[2] See Restatement, Contracts §§2, 19, 20, 22, 24, 60 (1932).

[3] Cohn v. Penn Beverage Co., 313 Pa. 349, 169 Atl. 768 (1934); Selig v. Philadelphia Title Ins. Co., 380 Pa. 264, 111 A.2d 147 (1955); United Air

claims to the Railroad Adjustment Board, assuming that the claims would still be timely. Individual claimants may present such claims to the board.[4]

Whether or not plaintiffs' allegations against the Brotherhood are sufficient to state a cause of action under the Railway Labor Act and the line of cases stemming from *Steele v. Louisville & N. R. R.*, 323 U. S. 192 (1944), we need not decide here. The reason is that the plaintiffs have failed to allege exhaustion of their remedies within the union or an adequate reason for failure to do so. They say that their complaint "has gone unheeded by all echelons of the Brotherhood since 1951," but nowhere is there an allegation that they have attempted to pursue remedies available to them within the Brotherhood's internal structure. Recent Pennsylvania decisions[5] show us that this Brotherhood does indeed provide internal remedies which appear adequate. In a case such as this, exhaustion of internal union remedies (absent an adequate reason for failure to do so) is a prerequisite to suit. Both Pennsyl-

cantile Agencies, Inc. v. Slotsky, 121 Pa. Super. 1, 182 Atl. 788 (1936); Alexanian v. Fidelity Philadelphia Trust Co., 152 Pa. Super. 23, 30 A. 2d 651 (1943).

[4] See the plain language of 45 U. S. C. A. §153, First (i) ("disputes between an employee or group of employees and a carrier") and (j) ("Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . ."). See also Conley v. Gibson, 355 U. S. 41, 47 (1957) and Colbert v. Brotherhood of R. R. Trainmen, 206 F. 2d 9, 12 (9th Cir. 1953), cert. denied 346 U. S. 931 (1954). Cf. Steele v. Louisville & N. R. R., 323 U. S. 192, 205-06 (1944).

[5] Grand Lodge v. Girard Lodge No. 100, 384 Pa. 248, 120 A. 2d 523, cert. denied 351 U. S. 985 (1956); McGovern v. Brotherhood of Ry. and Steamship Clerks, September Term 1956, No. 3908 in Equity, Ct. Common Pleas No. 2, Philadelphia County, May 23, 1957. See also Fagan v. Pennsylvania R. R., 173 F. Supp. 465, 474 (M. D. Pa. 1959).

vania [6] and Federal[7] authorities support this conclusion.

Without going into all the other bases of defense brought before both the district court and this Court, we think it abundantly clear that the judgment of the district court was correct and the decision will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

C.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Caption Omitted.)

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Upon consideration of the petition filed by plaintiffs-appellants March 7, 1960, and of the answer thereto by The

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[6] In a recent case, Fagan v. Pennsylvania R. R., 173 F. Supp. 465, 473-74 (M. D. Pa. 1959), Judge Follmer gives this trenchant statement of the legal proposition: "The law in Pennsylvania is well established that members of a labor organization may not seek relief in the courts against their union until they have exhausted all remedies available to them within the union to satisfy their grievances." The statement of the learned judge is fully borne out by the Pennsylvania decisions. See Durso v. Philadelphia Musical Soc'y, Local No. 77, 11 Pa. D. & C. 2d 463, 467 (1957), aff'd per curiam 392 Pa. 30, 139 A. 2d 555, 557-58 (1958); Binkowski v. Highway Truck Drivers and Helpers, Local 107, 8 Pa. D. & C. 2d 254, 255, aff'd per curiam 389 Pa. 116, 132 A. 2d 281, 283 (1957); Grand Lodge v. Girard Lodge No. 100, 384 Pa. 248, 262, 120 A. 2d 523, 530, cert. denied 351 U. S. 985 (1956).

[7] See Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 213-14 (1944).

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

It is ORDERED that the appellants' petition for clarification of judgment, directing the district court to allow plaintiffs to amend their complaint, be and it is hereby denied;

It is Further ORDERED that the petition for rehearing be and it hereby is denied.

By the Court,

GOODRICH,
Circuit Judge.

Dated: March 23, 1960.

D.

RAILWAY LABOR ACT (45 U. S. C. A. 151 ET SEQ.).

(1) Section 152 Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

(2) Section 153 First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided —

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or

through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve: but no labor organization shall have more than one representative on any division of the Board.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle

such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(3) Section 153 Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189.

(4) Section 155 First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(5) Section 156. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and

said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

E.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1959 (29 U. S. C. A. 401).

29 §411 (a) (4). Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

F.

FIFTH AMENDMENT TO THE U. S. CONSTITUTION.

". . . nor be deprived of life, liberty or property without due process of law . . ."

G.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Caption Omitted.)

COMPLAINT.

Come now the plaintiffs, James A. Gainey, 1016 Sheridan Street, Camden, New Jersey and J. L. Young, 1237 North 53rd Street, Philadelphia, Pennsylvania, individually and on behalf of those similarly situated and complain against the defendants as follows:

I.

This is a civil action arising under the constitution and laws of the United States brought under the Railway Labor Act, 45 U. S. Code 151 et seq.

II.

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (herein-

after referred to as the Brotherhood) is a voluntary unincorporated association, a standard railway labor organization, the representative, for all of the purposes of the Railway Labor Act, of the craft or class of clerical, office, station and storehouse employees including the plaintiff employees and others similarly situated on the Pennsylvania Railroad Company.

III.

The members of the Brotherhood and the employees of the defendant railroad company in the craft or class of clerical, office, station or storehouse employees represented by the said Brotherhood are so numerous and their exact number so large as to make it practically impossible to make them all parties by name, and it is impracticable to bring all of them before the Court by name; the said persons constitute a general class of persons, with a common interest in the subject matter of this suit and their interests are fairly represented by the named plaintiffs who sue in their own right and on behalf of all of those similarly situated. The named plaintiffs are residents of Camden, New Jersey and Philadelphia, Pennsylvania, one within the district of the United States District Court, for the Eastern District of Pennsylvania, the other in New Jersey.

IV.

The Brotherhood defendant maintains an office at the Lewis Tower Building, 15th and Locust Streets, Philadelphia, Pennsylvania and is represented there by J. C. McGuigan, an officer of The Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and is thus doing business in Philadelphia, Penn-

sylvania and within the district of the United States District Court for the Eastern District of Pennsylvania. Defendant, The Pennsylvania Railroad Company, maintains an office at 30th Street Station, Philadelphia, Pennsylvania, and is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and is engaged in the business of a common carrier by railroad and operates through the district of the United States District Court for the Eastern District of Pennsylvania, and is subject to the provisions of the Railway Labor Act, as is the defendant Brotherhood.

V.

The jurisdiction and venue of this Court are established by precedents of the United States Supreme Court which hold that the (Federal) right not to be discriminated against is implied in the Railway Labor Act. (45 U. S. Code 152 et seq.)

VI.

All the plaintiffs and those similarly situated for whom this suit is brought are or were at certain periods since August 1, 1950 employees classified as Group I workers, i. e., clerks, and more specifically, "tallymen", said employees were and are members of the defendant Brotherhood and are covered by a collective bargaining agreement entered into by the defendant Brotherhood and the defendant, The Pennsylvania Railroad Company, on May 1, 1942.

VII.

At all times prior to and since August 1, 1950, "tallymen" on the Pennsylvania Railroad Company were and are paid

by arbitrary geographic demarcations, i. e., employees in this classification working in the so-called Eastern Region (Altoona East to New York, Philadelphia, and Washington, D. C.) were paid $1.44 per hour based on 169½ hours per month, while employees in the so-called Central Region (West of Altoona to Fort Wayne, Indiana) were paid $269.17 per month. Thus for the same type of work an employee in Pittsburgh (Central Region) received $24.09 more per month than his counterpart in Philadelphia, or New York (the Eastern Region). Moreover, salaried employees received paid sick leave, ranging from one to three weeks depending on service, to which hourly employees are not entitled. These salary differentials persist to the present time although there have been since 1950 several salary increases for both regions.

VIII.

This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S. V. W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. In substance the defendant railroad company agreed to pay "tallymen" on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit "A".

IX.

The Pennsylvania Railroad Company, however, later refused to effectuate the agreement to equalize the pay rate between the Eastern and Central Regions and to this day has failed to abide by the agreement.

X.

The defendant Brotherhood despite the agreement which they consummated on behalf of the plaintiffs, as aforesaid, nevertheless failed to take any of the procedural steps as provided by the Railway Labor Act to solve the impasse. Moreover, when the Railroad closed its file on this agreement, the Brotherhood did likewise. To this day the Brotherhood has failed to use any legal or economic machinery to compel the Pennsylvania Railroad Company to effectuate this agreement.

XI.

The Brotherhood had at its disposal Sec. 5 (First) (a) (b) of the Railway Labor Act which provides for mediation. It failed to seek a presidential-fact-finding board. It failed to seek a strike ballot among the members of this craft to enforce the agreement.

XII.

The apathy demonstrated by the defendant Brotherhood is not founded in inability to cope with management, or ignorance, or failure of proper legal counseling. On the contrary, competent attorneys represent the Brotherhood of

Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. In Philadelphia Saul, Ewing, Remick and Saul are local counsel, while former Judge Robert S. Marx and Nichols, Wood, Marx & Gitner of Cincinnati are general counsel for the Brotherhood.

XIII.

The only reason for failure of the Brotherhood to compel the Pennsylvania Railroad Company to abide by its agreement is that the Pennsylvania Railroad Company could control union officers at will. For all of the officers of the Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees were former officers of the Pennsylvania Railroad Company union which was disbanded by the carrier in 1937 when the Brotherhood obtained the collective bargaining rights for this craft on the Pennsylvania Railroad.

XIV.

The plaintiffs have no specific remedy under the Railway Labor Act to compel the defendant railroad company to abide by the aforesaid agreement since mediation can only be invoked by a carrier or a Brotherhood. And since this is not a matter involving interpretation of an agreement, the machinery of the National Railroad Adjustment Board is unavailable to the plaintiffs. (Sec. 3 First (i) Railway Labor Act.)

XV.

The plaintiffs have no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Com-

pany has gone unheeded by all echelons of the Brotherhood since 1951.

XVI.

The failure of the defendants, the Brotherhood and the Pennsylvania Railroad Company, to effectuate this equalization of pay agreement as aforesaid has worked an economic hardship on the plaintiffs and other members of the class in that they receive less money than like Pennsylvania Railroad employees for the same work.

XVII.

Though the carrier has a constitutional right to discriminate against employees when it agrees to remove that discrimination as part of a collective bargain it cannot then attempt to abrogate that agreement and renew the discrimination to the pecuniary detriment of employees.

XVIII.

A collective bargaining representative may *not* discriminate against a class of employees for whom it has the bargaining right and especially when it discovers a discrimination against a group by a carrier it owes the duty to that class of eliminating that arbitrary classification and it owes a further duty of implementation by continual watching and policing to see that the carrier is abiding by the agreement to avoid discrimination. Moreover, third party beneficiary rights ripened on behalf of plaintiffs when these defendants consummated the aforesaid agreement. As such, plaintiffs have the right to enforce that agreement against the Pennsylvania Railroad defendant and to sue the Brotherhood for breach of trust.

XIX.

The Brotherhood violated the duty it owed to the plaintiffs in that —

1. When it entered into the agreement to equalize pay between the Eastern and Central Regions, it should have demanded immediate performance on the part of the carrier.

2. If it had been alert, upon the carrier's failure to abide by the agreement, it should have at least sought mediation service provided by the Railway Labor Act.

3. Or it could have brought suit against the carrier for breach of contract by way of a mandatory injunction and damages.

4. The Brotherhood continues in ignoring its duty to the present time.

XX.

The Pennsylvania Railroad Company violated its agreement to equalize pay between the Eastern and Central Regions with the knowledge that it would suffer no repercussions since its former company union officers (now Brotherhood officers) would take no action against the company without the company's permission. As a result of this wanton disregard by the defendants of the purposes of the Railway Labor Act, each plaintiff has suffered losses in wages since 1950 amounting to $2,890 and for each month in the future that this agreement remains unenforced approximately $30. (Since the aforesaid agreement was consummated, there have been several wage increases.) A

minimum of 600 persons on the Eastern Region comprise this class. Hence, damages to date aggregate $1,734,000 without interest.

WHEREFORE, Plaintiffs on their behalf and all those similarly situated demand relief as follows:

1. Mandatory injunction compelling defendant Pennsylvania Railroad Company to equalize the pay scale for "tallymen" between the areas formerly known as the Central Region and the Eastern Region.

2. Damages against the Pennsylvania Railroad Company for losses in earnings for a minimum $1,734,000.

3. Interest against the Pennsylvania Railroad Company at 6 per cent from August 1, 1951 to the date of judgment.

4. Punitive damages on item (2) supra against the defendant Brotherhood equal to the judgment assessed against the Pennsylvania Railroad Company for wanton breach of trust and violation of the duty owed to the plaintiffs as agents, and for violating their statutory duty.

5. An order compelling the defendant Brotherhood to return dues collected from plaintiffs for the period in question since defendant gave plaintiffs no quid pro quo for these union dues.

6. Such other and further relief as the Court may determine to be necessary in the premises.

/s/ LAWRENCE J. RICHETTE.
Attorney for Plaintiffs.

EXHIBIT "A".

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary
Treasurer

G. R. Kershaw,
Senior Vice General Chairman
G. M. Hill,
Vice General Chairman
M. C. Renkenberger,
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD OF ADJUSTMENT
1214-16 Clark Bldg.—717 Libert Ave., Pittsburg 22, Pa.
File 4.114 Eastern Region
Subject: Piecework on Tonnage
Rates of Pay ——
Philadelphia Transfer
April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Region
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement

of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

> "We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location."

In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

Will you please advise if you concur.

Yours truly,
s/ S. V. M. Loehr
General Chairman

Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S.V.W.L.
Above letter found at X 162-163 of original Record C. P. #1, Dec. Term, 1953, No. 6298.

AMENDMENT.

In accordance with Federal Rules of Civil Procedure No. 15 Plaintiffs amend paragraph IX of the above captioned Complaint by adding the following:

However the Pennsylvania Railroad Company in 1951, despite its failure to equalize the pay rates between the Eastern and Central Region did eliminate tonnage payments to tallymen contrary to the collective bargain dated July 29, 1941 and contrary to the Railway Labor Act.

/s/ LAWRENCE J. RICHETTE
MEEHAN, NEIL & RICHETTE.

H.

II. Petition for Clarification of Judgment to allow Plaintiffs to Amend their Complaint in the lower court.

Plaintiffs, by their attorneys, Meehan, Neil & Richette, Esquires pray that the court amend its judgment—in the event that it is disposed not to grant a rehearing—allowing the Plaintiffs to file the following amended Complaint in this cause: As authority for this prayer, the court is respectfully requested to review the following cases wherein Circuit Courts allowed Amended Complaints to be filed in the lower courts: *Alderman et al. v. Elgin, J. & E. Ry. Co.*, 125 F. 2d 971—this is the forerunner of the landmark case of *Elgin et al. v. Burley*, 325 U. S. 711; *Dollar SS Lines, Inc., et al. v. Merz*, 68 F. 2d 594.

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 26133.

JAMES A. GAINEY, 1016 Sheridan Street, Camden, N. J.
and
J. L. YOUNG, 1237 North 53 Street, Philadelphia, Pa., individually and on behalf of others similarly affected, Plaintiffs

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Philadelphia, Pa.
and
THE PENNSYLVANIA RAILROAD COMPANY, Philadelphia, Pa.

AMENDED COMPLAINT.

Come now the Plaintiffs, James A. Gainey and J. L. Young, individually and on behalf of those similarly affected and complain against the defendants as follows:

I.

This is a civil action arising under the constitution and laws of the United States, more particularly the Plaintiffs

allege that the defendants have violated 45 United States Code 151 et seq. (The Railway Labor Act), and the Fifth Amendment to the United States Constitution.

II.

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Brotherhood) is a voluntary unincorporated Association, the statutory representative under the Railway Labor Act of the Plaintiffs and others similarly situated.

III.

This is a True Class Action in that the Plaintiffs sue for themselves and a class of persons—over 600—too large to bring before the court, all of whom are represented by the Brotherhood and either were or now are employed by the Pennsylvania Railroad; this class derives its rights from the Railway Labor Act for the reason that at all times pertinent hereto they were employees of the Pennsylvania Railroad and members of the Brotherhood; and these two defendants were signatories to a nationwide collective bargain still in existence dated, May 1, 1942 defining the rights and obligations of the parties thereto for and on behalf of the Plaintiffs and others similarly situated.

IV.

The Brotherhood defendant maintains an office at the Lewis Tower Building, 15th and Locust Streets, Philadelphia, Pa., which is the Philadelphia headquarters of the so-called System Board of Adjustment for the Pennsylvania

Railroad, and is there represented by officers and staff members of the Brotherhood, and is thus doing business within the Eastern District of Pennsylvania; while the defendant Pennsylvania Railroad is a Pennsylvania corporation with offices at 30th and Market Street, Philadelphia, Pennsylvania, doing business within the Eastern District of Pennsylvania and like the Brotherhood is subject to the commands of the Railway Labor Act.

V.

The jurisdiction and venue of this Court are invoked pursuant to Title 28, United States Code, Section 1331, this being a suit in equity under the Constitution of the United States and the laws of the United States, viz., the Fifth Amendment of the Constitution and 45 United States Code, Section 151 et seq.—The Railway Labor Act, wherein the matter in controversy exceeds the sum of $10,000.

The rights sought to be redressed against the Brotherhood are: (1) the right to be represented with fairness and impartiality, equal with all other tallymen on the Railroad (2) the right not to be discriminated against because Plaintiffs belonged to lodges which had rebelled against Grand Lodge leadership, said discrimination consisting in failing to equalize pay between two regions on the Railroad to the pecuniary detriment of Plaintiffs, being part of a plan to destroy opposition among the Plaintiffs and other crafts in this Brotherhood of the Eastern Region (3) the right to expect a statutory representative to do its duty—irrespective of the personal feelings of the Grand President and the General Chairman—toward the Plaintiffs and others in this class—and immediately invoke the services of the National Mediation Board when a railroad refuses to further negotiate a collective bargain—if the latter is a fact, which Plaintiffs want Discovery for purposes of ascertaining (4) the right to expect the statutory representative to seek im-

mediate judicial injunction preventing the carrier from unilaterally terminating a collective bargain, contrary to section 6 of the Railway Labor Act (5) the right to expect a statutory representative to set aside its prejudices against Eastern Region members and thereby give these members a hearing when they protest the illegal actions of their General Chairman in failing to complete negotiations on their behalf for a new collective bargain in lieu of one illegally terminated by the carrier (6) the right to expect the statutory representative to afford a hearing, consistent with due process, on the complaints of Plaintiffs against their General Chairman and the Pennsylvania Railroad and within a reasonable time thereafter render a decision so that the Plaintiffs could appeal this action from the Grand President's decision to the Grand Executive Council for review, and from there to the quadrennial convention of the Grand Council (7) the right to expect the decisions from these various appeal levels within reasonable time limitations so that members may seek judicial relief of the decisions of the various union appellate bodies (8) the right to damages against the union for their failure to act in accordance with the commands of the Railway Labor Act.

The rights sought to be redressed against the Pennsylvania Railroad are: (1) the right to have judicially determined whether or not it may unilaterally terminate an existing collective bargain (2) Whether this termination is void since the carrier failed to give notice as required under section 6 of the Railway Labor Act (3) the right to have judicially determined whether or not the carrier and the Brotherhood Division Chairman had a meeting of the minds with respect to a new agreement to take the place of the old one unilaterally terminated by the carrier (4) the right to have judicially determined when this new agreement—if one was made, and Plaintiffs request Discovery to determine this fact—was consummated and when it was to go into effect and what its full terms were (5) the right to have judicially determined if no new agreement

was consummated why the Railroad did not invoke the services of the National Mediation Board and the other provisions of the Railway Labor Act as to arbitration and conciliation (6) the right to have a judicial determination as to whether or not the carrier must answer in damages for all the losses Plaintiffs have suffered for its failure to equalize pay rates for Eastern Region tallymen with those in the Central Region (7) the right to have judicially determined whether or not the Pennsylvania Railroad and the Brotherhood did not act with malice aforethought to deceive and deprive the Plaintiffs of their rights under the Railway Labor Act and hence liable in damages to the Plaintiffs for exemplary and punitive damages at least equal to the actual losses suffered by the Plaintiffs since 1950.

VI.

All the Plaintiffs were at all times pertinent hereto tallymen on the Eastern Region of the Pennsylvania Railroad, during which time they were members of the Brotherhood and enjoyed the rights of the aforementioned national collective bargain dated May 1, 1942, and the rights of all railroad workers as defined by Congress.

VII.

Prior to July 29, 1941 Tallymen—railroad workers who check freight in railroad cars—in the Eastern Region of the Pennsylvania Railroad (East of Altoona to New York and south to Washington, D. C.) received less pay than their counterparts in the Central Region (West of Altoona to Chicago). As a matter of fact, Eastern Region Tallymen received hourly rated pay of $1.44 per hour while the Central Region Tallymen received $269.17 per month, along

with paid vacations, depending upon length of service and paid sick time. The Eastern Region Tallymen did not have these latter benefits. With the advent of World War II the Pennsylvania Railroad desiring to speed the handling of freight entered into an agreement with the Brotherhood on behalf of the Tallymen, agreeing to pay the Tallymen on the Eastern Region a bonus for every ton of freight checked, over and above their hourly rate of pay, viz. $1.44. That agreement was placed into effect on July 29, 1941. The effect was to at least equalize the pay between the Eastern and Central Regions on the carrier for Tallymen.

After World War II, the Pennsylvania Railroad's freight handling was reduced to normal and they expressed a desire to abrogate the agreement of July 29, 1941.

VIII.

The first meeting for the purpose of negotiating a new collective bargain to replace the agreement of July 29, 1941 took place on February 15, 1949. Mr. S. V. W. Loehr, General Chairman of the Brotherhood represented the Tallymen on the Eastern Region, and Mr. W. Stewart, Superintendent of Stations, represented the Pennsylvania Railroad. Though all the terms of the agreement are not known to the Plaintiffs—and they request Discovery to determine the exact terms—Mr. S. V. W. Loehr did communicate to Plaintiffs' representative, Division Chairman Joseph P. Zawada that the carrier wanted to eliminate the bonus payments for tallying freight and in lieu thereof give the same pay to Eastern Region tallymen which the Central Region tallymen were then receiving. The Division Chairman polled the membership and after receiving their favorable assent to this agreement communicated this to Mr. Loehr who in turn told the Pennsylvania Railroad that the agreement was acceptable to the Plaintiffs. On April 21, 1950 Mr. Loehr confirmed this understanding by a letter to the

General Manager of the Eastern Region of the Pennsylvania, a copy of this letter is attached hereto and marked Exhibit A. Plaintiffs are unaware of what followed this letter, except that they are informed that some official on the railroad balked at equalization of pay for Plaintiffs. They learned of this fact from testimony given by Mr. Loehr in the *Grand Lodge v. Girard Lodge* case wherein the locals of which Plaintiffs were members had their charters revoked by the Grand President in 1954. A copy of Mr. Loehr's testimony in that case is attached hereto and marked Exhibit B.

IX.

In or about the summer of 1950 the Pennsylvania Railroad without giving notice as required in section 6. of the Railway Labor Act unilaterally terminated the bonus agreement of July 29, 1941. Moreover, it failed to put into effect the agreement outlined in the letter found at Exhibit A. or any other agreement which might have replaced the bonus agreement. As a result the Eastern Region Tallymen since the summer of 1950 have been receiving hourly rates of pay as they were prior to July 29, 1941, no vacation pay and no sick paid leave, thus earning approximately $25 per month less than their counterparts in the Central Region, and experiencing a less favorable position on the Seniority Roster.

X.

The defendant Brotherhood failed to invoke any of the procedures of the Railway Labor Act at this willful violation of that Act by the Pennsylvania Railroad. It could have sought an injunction for the carrier's failure to give notice under section 6. of the Act of its desire to terminate

a collective bargain. It could have invoked the services of the National Mediation Board, failing which it could have sought Arbitration and Conciliation as provided by the Act. But the Brotherhood deliberately did nothing to prevent the monetary losses suffered by the Plaintiffs as a result of this unilateral act of the carrier.

XI.

Plaintiffs believe and therefore aver that the action of the Brotherhood in failing in its statutory duty to collectively bargain on behalf of Plaintiffs was a deliberate act of collusion with the carrier to defeat their rights under the old collective bargain and thus effectively punish Plaintiffs for being part of the rebellion in the Eastern Region against the leadership in the Brotherhood.

XII.

Since the Brotherhood has the collective bargaining rights under the Act, the plaintiffs are powerless to compel the defendants to negotiate a new agreement to replace the July 29, 1941 bonus agreement, since under the Act only the collective bargaining representative may negotiate agreements. Individuals are restricted to actions only as to grievances under existing agreements. An individual may not invoke the services of the National Mediation Board or any other collective bargaining provision of the Act.

XIII.

Division Chairman Joseph P. Zawada on behalf of Plaintiffs upon learning of the carrier's abrogation of the July 29, 1941 agreement without first substituting for it a new

equalization of pay agreement, requested of the General Chairman a clarification of his views as to what action was to be taken to compel the carrier to replace the old agreement. Mr. Loehr categorically told Mr. Zawada it was not his affair and refused thereafter to discuss the matter with him. That winter of 1950 Mr. Zawada wrote to the Grand President, George M. Harrison telling him of the continuous rebellion on the Eastern Region because of the failure of the General Chairman to present grievances of members and because of this statutory violation of the railroad relative to the Tallymen. After many communications of this nature the Grand President finally acquiesced and sent two Vice-Presidents of the Brotherhood to hear the evidence against Mr. Loehr. Two full days of testimony were taken at which the substance of this complaint was aired. A report was filed with the Grand President by these two agents.

Mr. Zawada then in early 1951 and thereafter for a period of two years repeatedly requested the Grand President to determine whether or not anything could be done to compel the carrier to re-open negotiations on behalf of the Eastern Region Tallymen, and to compel Mr. Loehr to act on behalf of the Plaintiffs in accordance with the statutory duty of the Brotherhood. But Mr. Harrison refused to acknowledge Mr. Zawada's requests. In 1954 Mr. Harrison revoked the charters of the Philadelphia locals in which many of the Plaintiffs held membership.

In 1958, counsel for the Plaintiffs, Mr. Lawrence J. Richette, Esquire, of the Philadelphia Bar, at a special conference with Mr. Harrison, the Grand President, again requested a decision from him as to the General Chairman's inaction relative to this complaint. None was given, and none has been given to Mr. Zawada, counsel, or any member of the class represented by Plaintiffs.

XIV.

Since the Grand President has refused to render a decision since 1950 on this complaint, the Plaintiffs are unable to appeal his decision to the Grand Executive Council, which is the next appellate body in the Brotherhood, the next and last appeal being to the quadrennial Convention. There have been two such conventions since this action commenced in 1950. The Brotherhood constitution states that an appeal from the decision of the Grand President may be had to the Grand Executive Council. Since the Grand President has not rendered any decision—affirmative or negative—no appeal can be made to this body. Moreover, even if the Grand President, after these ten years, were to render a decision it would be vain and illusory to attempt an appeal since all the members of the Executive Council approved the Grand President's action in revoking the charters of the locals in which many of the Plaintiffs were lodged, and this council is made up of Vice Presidents selected by the President.

XV.

The Brotherhood violated its stautory duty and the Fifth Amendment to the United States Constitution (equal protection of the law clause) when it failed to negotiate or consummate an agreement equalizing the pay between the Eastern and Central Regions for Tallymen; it is guilty of violating the Act by allowing irrelevant and invidious differences—geographic—to remain in the collective bargain; it is guilty of discrimination in that it refuses to bargain collectively for its members in the Eastern Region, while it bargains collectively for all other members of the Brotherhood outside of this region. And it does this for the reason that it wishes to punish a segment of its membership which

dares rise in revolt at its poor leadership, knowing that it is safe so long as judicial action is not taken by the class, since under the Act only the Brotherhood, which has the collective bargaining rights, has power to rectify this irrelevant and invidious discrimination between the two regions which has existed for ten years.

XVI.

The carrier violated its statutory duty to negotiate a new agreement to equalize pay to replace the old bonus agreement; it violated the statute when it unilaterally abrogated the agreement without first complying with section 6 of the Act. By this wanton disregard of Plaintiffs' rights, it has deprived the Plaintiffs of approximately $25 per month in added pay since the summer of 1950, and an average of two weeks pay for vacation time, and a minimum of one week's pay for sick leave. Since there are more than 600 members for whom this suit is brought, the damages actually suffered by Plaintiffs in this class suit are well over two million dollars, without interest, exemplary or punitive damages.

WHEREFORE, Plaintiffs on their behalf and all those similarly situated request relief as follows:

1. A judicial determination by way of a declaratory judgment or otherwise of whether or not the Railroad and the Brotherhood had consummated a new equalization of pay agreement to be substituted for the old bonus agreement of July 29, 1941;

2. A judicial determination of whether or not the Railroad violated the Act when it failed to give notice that it wished to abrogate the July 29, 1941 agreement;

3. A judicial determination of whether or not the Railroad and the Brotherhood were in collusion to defeat the rights of the Plaintiffs in the new agreement and under the old one which was unilaterally cancelled by the carrier.

4. A judicial determination of whether or not the Brotherhood acted with malice in failing to compel the Railroad to continue negotiating the new agreement;

5. A judicial determination of whether or not the Brotherhood in concert with the Railroad deliberately maintained the irrelevant and invidious discriminatory pay differential between the Eastern and Central Region Tallymen.

6. A judicial determination of why the Brotherhood failed to invoke any of the provisions of the Act to bring about a resolution of this dispute between the Plaintiffs and the Railroad.

7. To assess damages against the carrier for the exact losses of the 600 plaintiffs for ten years i.e., $1,800,000 losses in salaries and $1,080,000 in lost vacations and sick leave, and punitive and exemplary damages in an equal sum against the Brotherhood and a return of union dues collected from Plaintiffs by the Brotherhood for the past ten years.

8. Such other and further relief as the court may determine necessary in the premises.

/s/ LAWRENCE J. RICHETTE,
MEEHAN, NEIL & RICHETTE.

AFFIDAVIT OF LAWRENCE J. RICHETTE, ESQUIRE ON BEHALF OF PLAINTIFFS.

Lawrence J. Richette, being duly sworn according to law deposes and says that he is counsel for the Plaintiffs and from his own knowledge, information and belief the following facts as well as those in the attached Amended Complaint are true:

1. The Pennsylvania Railroad and the Brotherhood of Railway Clerks entered into a collective bargain in July of 1941 wherein Eastern Region tallymen received bonuses, in addition to their hourly rated pay, based on tons of freight checked.

2. The Pennsylvania Railroad and the Brotherhood of Railway Clerks commenced negotiations on or about Feb. 1949 with the object of replacing the "bonus payments agreement" of July 1941 with an agreement whereby the Eastern Region tallymen would receive monthly salaries equal to the salaries received by tallymen in the Central Region of the Pennsylvania Railroad..

3. The Pennsylvania Railroad violated Section 6. of the Railway Labor Act when it terminated the bonus payment agreement with the Tallymen of the Eastern Region since it gave no notice.

4. The Brotherhood of Railway Clerks confirmed the negotiated terms of the "equalization of pay agreement" in a letter which is attached hereto (Exhibit "A"); but failed to pursue the matter further when the Railroad failed to live up to its terms. See notes of testimony attached hereto (Exhibit "B").

5. Joseph P. Zawada, was Division Chairman of the Philadelphia locals which contained many of the Plaintiff tallymen and it was this lower echelon union officer who in 1950 appealed on behalf of the Plaintiffs to the Grand President, George M. Harrison for a review of the actions of the Railroad and the actions of the General Chairman, Brotherhood of Railway Clerks, S. V. W. Loehr, who allowed the carrier to abrogate the old agreement and terminate negotiations on the new "equalization of pay agreement".

6. As a result of Zawada's protest to the Grand President, the latter sent two Vice-Presidents to Philadelphia who in 1950 during a two day session took lengthy testimony of the dispute between plaintiffs and the Railroad and the General Chairman, S. V. W. Loehr.

7. A report was then given by these two agents of the Grand President to the latter, who took no action on the charges therein.

8. Zawada on behalf of the Plaintiffs then wrote a series of letters and telegrams to the Grand President protesting his failure to render a decision.

9. The Grand President then revoked the charters of the locals in which many of the plaintiffs held membership, and refused to heed any of their complaints against the carrier or upper echelon union officers.

10. Your deponent on behalf of Plaintiffs brought this dispute to the attention of the Grand President at a meeting in the offices of Saul, Ewing, Remick and Saul, local counsel for the Brotherhood, where the Grand President promised to render a decision in the matter. Since that time, 1957, the Grand President has not communicated with your deponent or any member of the class whom Plaintiffs represent. The matter remains undecided to this day.

11. The Constitution of the Grand Lodge of the Brotherhood of Railway Clerks on the problem in question reads:

"APPEALS FROM DECISION OF THE GRAND PRESIDENT

Section 6. Any lodge or member of the Brotherhood feeling aggrieved by the decisions of the Grand President in matters of Law and Equity may appeal to the Grand Executive Council within sixty (60) days after such decision; said appeal to be in writing, the original to be sent to the Grand Secretary-Treasurer and one copy to each member of the Grand Executive Council."

12. An appeal to the Executive Council therefore presupposes that a decision has been rendered by the Grand President. There is no provision in this Constitution for an appeal from the inaction of the Grand President, where he fails to make an affirmative or negative decision.

13. Plaintiffs commenced their suit against the Brotherhood for the reason that the constitution of the Brotherhood gave them no avenue of recourse where their General Chairman fails in his statutory duty and the Grand President refuses to render a decision on this charge for 10 years.

/s/ LAWRENCE J. RICHETTE.
Lawrence J. Richette.

Sworn to and subscribed before me this 2nd day of March 1960.

/s/ ROSE MARIE FALO,
Notary Public.
Philadelphia, Philadelphia Co.
My Commission Expires April 10, 1963.

AFFIDAVIT.

Lawrence J. Richette, Esquire, being duly sworn according to law deposes and says that he is counsel for the Plaintiffs herein and that the Petition for Rehearing and For Clarification of Judgment of this Court to Allow an Amendment of the Complaint in the lower court is not filed for delay but in good faith because he believes that the Court overlooked certain arguments which are presented herein; moreover the deponent states that all the facts contained in the petition as well as in the proposed Amended Complaint are true to the best of his information, knowledge and belief, as each and every fact has been verified by him personally.

/s/ LAWRENCE J. RICHETTE,
Counsel for Plaintiffs.

Sworn to and subscribed before me this 2nd day of March 1960.

/s/ ROSE MARIE FALO,
Notary Public.
Philadelphia, Philadelphia Co.
My Commission expires April 10, 1963.

EXHIBIT "A".

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary
Treasurer

G. R. Kershaw
Senior Vice General Chairman
G. M. Hill,
Vice General Chairman
M. C. Renkenberger,
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD OF ADJUSTMENT

1214-16 Clarke Bldg.—717 Libert Ave., Pittsburgh 22, Pa.
File 4.114 Eastern Region

Subject: Piecework on Tonnage
Rates of Pay —
Philadelphia Transfer
April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Region
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949

with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

> "We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location."

In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

Will you please advise if you concur.

Yours truly,
/s/ S. V. M. Loehr
General Chairman

Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S. V. W. L.

Above letter found at X 162-163 of original Record C. P. #1, Dec. Term, 1953, No. 6298.

EXHIBIT "B".

At page 909a, *Grand Lodge, et al. v. Girard Lodge, et al.* (Court of Common Pleas No. 1 of Philadelphia County, No. 6298, December Term, 1953, (384 Pa. 248) Mr. Loehr testified as follows:

"Q. The third item related to the Tallymen; I think Mr. Zawada said there was an offer to eliminate this tonnage commission arrangement and give the Tallymen in this area the same rates as the Tallymen were being paid in the central region—I assume those rates were higher in the central region.

A. Yes.

Q. Was there a proposal to eliminate this tonnage plan or commission basis, and how did that proposal originate?

A. It originated as a result of our request to revise the tonnage agreement here in Philadelphia. The Carrier—when I say the Carrier, the General Manager with whom I dealt here wrote me a letter suggesting that the tonnage be eliminated. That letter was a letter in about 195—I have forgotten the date.

Q. Did you have a meeting with the General Manager on that subject?

A. Yes, I did.

Q. Do you remember the date of the meeting?

A. I said the General Manager; it was one of the members of his staff, to be explicit.

Q. Who was it?

A. It was Superintendent of Stations and Transfers, Mr. Stewart.

Q. That meeting was held in Philadelphia and was Mr. Zawada present?

A. Not at that particular meeting; there was a meeting on that day at which Mr. Zawada was present, but

this was something that happened at a further meeting on the same day.

Q. What arrangement, if any, did you work out with Mr. Stewart on this proposal to eliminate tonnage?

A. Well, I told Mr. Stewart that if the Railroad agreed to get rid of the tonnage here, I would be glad to do so for a price.

Q. What price did you ask?

A. I asked that he would pay the central region rates to tallymen, which are higher in the central than here in the Philadelphia area.

Q. What did Mr. Stewart say?

A. He agreed.

Q. Did you advise Mr. Zawada on the same day?

A. I called Mr. Zawada—I'm hazy about whether I called by telephone or spoke to him directly, but it was one or the other, and explained to him that the proposal was made to me.

Q. He took it up with his people and reported back to you?

A. He took it up with his protective committee, or Division committee, or whatever he holds these meetings with, and reported back to me it was acceptable.

Q. Then what happened between you and the Railroad?

A. Then I called Mr. Stewart and also the Central Manager's representative on the Personnel matters, who was Mr. Alexander at that time, and informed them that I would accept that offer, and that as soon as I returned to Pittsburgh I would confirm it in writing.

Q. Did you?

A. I did, sir.

Q. What happened?

A. I received a reply from the Central Manager that indicated that he didn't want to go all the way with what one of his subordinate officers agreed to do.

Q. Did you have a subsequent meeting and correspondence with the Railroad in an effort to put through the verbal agreement you had arrived at?

A. I did.

Q. Did the Railroad ever agree to do so?

A. They did not.

Q. What finally happened to the matter?

A. Closed up the Philadelphia transfer.

Q. Which was the only spot at which this tonnage was being paid?

A. That's correct.

Q. So you never did get this agreement through with the Railroad; is that right?

A. That's correct."

I.

¶1254 28 U. S. C. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Act of June 25, 1948 C646 (62 Stat. 928).